UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHINESE AUTOMOBILE DISTRIBUTORS OF AMERICA, LLC, a limited liability company, individually and, with respect to certain claims, in a derivative capacity, Plaintiff, v. MALCOLM BRICKLIN, an individual; JONATHAN BRICKLIN, an individual; BARBARA BRICKLIN JONAS, an individual; MICHAEL JONAS, an individual; SANIA TEYMENY, an individual; SCOTT GILDEA, an individual; and VISIONARY VEHICLES, LLC, a limited liability company; Defendants.	07 Civ. 4113 (LLS)

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiff Chinese Automobile Distributors of America, LLC ("CADA") respectfully submits this Memorandum of Law in opposition to Defendants' motion to dismiss the Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure ("Federal Rule") 12(b)(6).[1]

PRELIMINARY STATEMENT

CADA brings this lawsuit after being swindled out of millions of dollars by Defendant Malcolm Bricklin ("Bricklin"), who, along with the various members of his family, his companion, and his accountant also named as defendants in this case, systematically looted the assets of Defendant Visionary Vehicles, LLC ("VV"), in which CADA had invested. Specifically, CADA brings this lawsuit to recover, among other things, the $2 million investment it made with VV based on Bricklin's misrepresentations regarding the cause of VV's financial difficulties and VV's efforts to consummate the joint venture in which VV was supposed to engage.

Defendants seek to avoid responsibility for their misconduct by moving to dismiss the Complaint based on purely technical pleading requirements that Defendants contend have not been satisfied by CADA. In particular, Defendants argue that CADA's claim against Bricklin and VV for violating the federal securities laws should be dismissed because CADA purportedly fails to allege with the requisite particularity any material misrepresentation, scienter and causation. However, as explained in detail below, CADA has properly pleaded each of these elements of its federal securities claim and, thus, Defendants' motion to dismiss should be denied in its entirety.

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[1] References to the "Complaint" are to the Complaint filed by CADA on May 24, 2007, a copy of which is annexed as Exhibit A to Defendants' Notice of Motion.

STATEMENT OF FACTS

Plaintiff CADA is owned by Bruce and David Rothrock (together, the "Rothrocks"), who are pre-eminent automobile dealers in Western Pennsylvania. Complaint ¶ 2. Defendant Bricklin is the CEO of VV, which was formed for the purported purpose of partnering with Chinese automobile manufacturers to provide North American consumers with luxury vehicles at a price that is substantially less than the price of existing European and Asian luxury cars. *Id.* ¶¶ 3-4, 13.

Towards that goal, VV entered into a letter of intent to form a joint venture with Chery Automobile Company ("Chery"), an automobile manufacturer located in China. *Id.* ¶ 14. Under that joint venture, Chery would manufacture the vehicles, and VV would import and distribute them in the United States. *Id.* ¶¶ 14-15. On October 21, 2005, CADA invested $2 million with VV, for which CADA received approximately 800,000 shares in VV plus the right to sell the cars in certain territories. *Id.* ¶¶ 16, 18.

On February 21, 2006 and March 17, 2006, CADA invested a total of $2 million more with VV, for which CADA received additional shares in VV and additional sales territories. *Id.* ¶ 21. This additional $2 million investment was made by CADA based on various representations that were made to the Rothrocks by Bricklin on behalf of VV. *Id.* ¶¶ 21, 30, 39-40. Specifically, from December 2005 through February 2006, Bricklin made the following representations to the Rothrocks for the purpose of ultimately inducing the Rothrocks to invest more money with VV:

- Bricklin represented that VV needed additional funding to meet its payroll, and that important personnel instrumental to obtaining an exclusive distribution agreement with Chery would be lost if that additional funding was not provided, *id.* ¶ 20(c);

- Bricklin represented that VV was successfully selling the various sales territories to create a network of 250 dealers, and that VV had commitments of $50 million, *id.* ¶¶ 15, 20(b); and
- Bricklin represented that: the relationship he and VV had with Chery was very strong; Chery credited VV with Chery's own success; Chery preferred VV and Bricklin over any other automobile manufacturer; and Chery would extend the time required to fund the joint venture to enable VV to arrange for sufficient financing, *id.* ¶ 20(a).

However, as the Rothrocks later learned, these representations by Bricklin on behalf of VV were false. *Id.* ¶ 22. In particular:

- Bricklin knew that VV needed additional funding not because it was necessary to retain key personnel, but rather because he and the other Defendants had been systematically looting the company,[2] *id.* ¶¶ 22(b), 26;

- Bricklin knew that VV had raised far less than $50 million in commitments, and VV had signed up less than 50 dealers, contrary to the $50 million in commitments and 250 dealers that he had touted; *id.* ¶ 15, 22(a), 25; and

- Bricklin knew that, notwithstanding the strong relationship between VV and Chery that he tried to portray, VV would not in fact arrange for the financing needed to complete the deal with Chery, and that the joint venture could not be sustained in light of the true facts, *id.* ¶¶ 23-24.

As a result of Defendants' looting of VV, and the failure by Bricklin and VV to complete its deal with Chery, CADA's entire $4 million investment – including the additional $2 million investment it made based on Bricklin's representations – became worthless. *Id.* ¶¶ 21, 27, 30, 39-40. CADA's loss of its additional $2 million investment was the direct result of Bricklin's misrepresentations on behalf of VV: if the Rothrocks and CADA had known the truth about what caused VV's financial situation – i.e., that Defendants were systematically looting the

[2] As detailed in the Complaint, the looting, stealing and self-dealing committed by Bricklin, his family and his companions included: between 2004 and 2006, regular undocumented cash withdrawals totaling more than $250,000 from VV's accounts; undisclosed payments totaling nearly $5 million made by VV to other companies owned by Bricklin; numerous unexplained or extravagant "expenses" incurred by VV; and still more suspect payments made by VV to Defendants. Complaint ¶ 26.

company – and about Bricklin's and VV's failure to obtain $50 million in commitments and arrange for the financing needed to complete the deal with Chery, the Rothrocks and CADA would never have made the additional $2 million investment with VV. *See id.*

Consequently, CADA brought this action alleging, among other things, that Bricklin and VV are liable to CADA for violating the federal securities laws. *Id.* ¶¶ 36-40.[3] Defendants responded by moving to dismiss that count, arguing that CADA fails to state a claim under Federal Rule 12(b)(6), and ultimately seeking to have the remainder of the counts dismissed for lack of subject matter jurisdiction. MTD at 1.[4] CADA now opposes that motion.

ARGUMENT

The purpose of a Federal Rule 12(b)(6) motion to dismiss "is merely to assess the legal feasibility of the complaint, not to assay the weight of evidence which might be offered in support thereof." *Ruskin v. TIG Holdings, Inc.*, No. 98 Civ. 1068 (LLS), 2000 WL 1154278, at *3 (S.D.N.Y. Aug. 14, 2000) (quoting *Ryder Energy Distributions Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984)). Thus, when deciding a motion to dismiss, "[f]actual allegations made in the complaint are assumed to be true, and all inferences are drawn in favor of the plaintiff. Only if it appears to a certainty that a plaintiff could have proved no set of facts to sustain a claim for relief should the claim have been dismissed." *Ruskin*, 2000 WL 1154278, at *3 (quoting *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 534 (2d Cir. 1999)).

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[3] In addition to asserting a claim against Bricklin and VV for violating Section 10(b) of the Securities and Exchange Act of 1934, CADA asserts claims for fraud (Complaint ¶¶ 28-31), aiding and abetting fraud (*id.* ¶¶ 32-35), misappropriation of corporate funds (*id.* ¶¶ 41-45), corporate waste (*id.* ¶¶ 46-50), and breach of fiduciary duty (*id.* ¶¶ 51-54) against the various Defendants.

[4] References to the "MTD" are to the Memorandum of Defendants Visionary Vehicles LLC, Malcolm Bricklin, Jonathan Bricklin, Barbara Bricklin Joan, Michael Jonas, and Sania Teymeny in Support of Their Motion to Dismiss, dated June 29, 2007.

To state a claim under Rule 10b-5, promulgated under Section 10(b) of the Securities and Exchange Act of 1934, a plaintiff must allege that: (1) the defendant made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which the plaintiff relied; and (5) that the plaintiff's reliance was the proximate cause of its injury. *Leykin v. AT&T Corp.*, 423 F. Supp. 2d 229, 237-38 (S.D.N.Y. 2006) (citing 17 C.F.R. § 240.10b-5 and *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005)). Here, Defendants contend that the Complaint fails to state a Rule 10b-5 claim because CADA does not adequately allege the following elements: a material misrepresentation, scienter, and causation. Defendants are wrong, and their motion to dismiss should be denied.[5]

I. CADA HAS ALLEGED MATERIAL MISSTATEMENTS.

Under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), to properly allege misstatements or omissions of material fact that are actionable under Rule 10b-5, the plaintiff must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *Leykin*, 423 F. Supp. 2d at 238 (quoting 15 U.S.C. § 78u-4(b)(1)).

A plaintiff properly pleads the materiality element of a Rule 10b-5 claim where it alleges a misstatement or omission "that a reasonable investor would have considered significant in making investment decisions." *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 161 (2d Cir.

[5] In the event that the Court determines that CADA has failed to properly plead any element of its claim, CADA respectfully requests that the Court grant CADA leave to replead. *See, e.g., Bilick v. Eagle Elec. Mfg. Co.*, 807 F. Supp. 243, 256 (E.D.N.Y. 1992) (granting leave to replead Rule 10b-5 claim consistent with the "usual practice" under Federal Rule 15(a)); *Zaback v. Goldberg*, No. 86 CIV. 5990 (SWK), 1988 WL 38166, at *3 (S.D.N.Y. Apr. 20, 1988) (granting leave to replead Rule 10b-5 claim because leave to replead should be "freely granted").

2000). When presented with a Federal Rule 12(b)(6) motion, the Court cannot dismiss a complaint on the ground that the alleged misstatements or omissions are not material "unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *Id.* at 162 (quoting *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985)).

Here, Defendants argue that the Complaint "fails to allege *any* specific misrepresentation by Bricklin or VV in connection with CADA's investment." MTD at 5 (emphasis in original). Specifically, Defendants contend that CADA has not identified any misstatements with particularity, and that the statements identified in the Complaint are not alleged to be false. *Id.* at 6-11. Alternatively, Defendants argue that the misstatements alleged by CADA in the Complaint should "not be considered material." *Id.* at 5, 11-14. A review of the Complaint, however, demonstrates that CADA has properly pleaded that Bricklin and VV made material misstatements from December 2005 through February 2006.

For example, CADA alleges that Bricklin represented that VV needed additional funding to meet its payroll, and that important personnel instrumental to obtaining the exclusive distribution agreement with Chery would be lost if that additional funding was not provided. Complaint ¶ 20(c). However, as CADA further alleges, this representation was false. Specifically, CADA alleges that Bricklin knew that VV needed additional funding not because it was necessary to retain key personnel, but rather because he and the other Defendants had been systematically looting the company. *Id.* ¶¶ 22(b), 26.

CADA also alleges that Bricklin represented that VV was successfully selling its sales territories and had commitments of $50 million. *Id.* ¶ 20(b). That representation, however, was also false. As alleged in the Complaint, VV had far less than $50 million in commitments. *Id.* ¶ 22(a).

CADA further alleges that Bricklin represented that: the relationship he and VV had with Chery was very strong; Chery credited VV with Chery's own success; Chery preferred VV and Bricklin over any other automobile manufacturer; and Chery would extend the time required to fund the joint venture to enable VV to arrange for sufficient financing. *Id.* ¶ 20(a). In other words, Bricklin represented that the joint venture was positioned to move forward with its business plans. These representations, again, were false. As alleged in the Complaint, Bricklin's unreasonable rejection of financing and unwillingness to complete the deal with Chery caused the joint venture to collapse. *Id.* ¶¶ 23-24. Indeed, as discovery in this case will show, Bricklin in fact had no intention of conceding the equity control necessary to obtain financing to move forward with the joint venture (*see id.*), and his statements regarding the "strong" relationship with Chery were nothing more than part of Bricklin's scheme to obtain more money from unwitting investors.

Moreover, CADA alleges that these misrepresentations were made by Bricklin and VV to the Rothrocks, who owned CADA and who decided to invest an additional $2 million with VV based on these misstatements. *Id.* ¶¶ 2, 20-21, 29-30, 37-39. Defendants fail in their attempt to dismiss these misstatements as mere "puffery or misguided optimism," MTD at 12, because Defendants do not and cannot show that these misstatements were "so obviously unimportant to a reasonable investor" to render them immaterial. *Ganino*, 228 F.3d at 162. *See also In re eSpeed, Inc. Sec. Litig.*, 457 F. Supp. 2d 266, 280 (S.D.N.Y. 2006) (explaining that the "materiality question is not often amenable to disposition as a matter of law" unless it can be shown that "no reasonable investor could find [the alleged misstatements] important to the total mix of information available").

In short, as noted by Defendants, the purpose of requiring plaintiffs to plead material misstatements with particularity is to provide defendants with notice of the precise statements at issue so they can "evaluate," and ultimately defend themselves from, the claims against them. MTD at 7. Here, CADA has done exactly that.

II. CADA HAS ALLEGED SCIENTER.

To plead scienter under the PSLRA, a plaintiff must allege "facts giving rise to a strong inference that the defendant acted with the required state of mind." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2504 (2007). The required state of mind for a Rule 10b-5 claim is "an intent to deceive, manipulate or defraud." *Ganino*, 228 F.3d at 168 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)). An inference of such intent is "strong" as long as it is "more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent." *Tellabs*, 127 S.Ct. at 2504-05. "[G]reat specificity" is not required to properly plead scienter. *Ganino*, 228 F.3d at 169 (quoting *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 84 (2d Cir. 1999)); *eSpeed*, 457 F. Supp. 2d at 281.

Here, CADA clearly pleads that the alleged misstatements by Bricklin (described above) were "known to be false by Bricklin" and that they were "made by him for the purpose of inducing" CADA to invest more money with Bricklin and VV. Complaint ¶ 22. *See also id.* ¶¶ 29, 37, 38 (alleging that the misstatements were made by Bricklin "intentionally" and "knowingly or recklessly"). In their motion, Defendants do not offer any "non-fraudulent" purpose for the statements made by Bricklin. MTD at 14-15 (arguing in conclusory fashion that

CADA alleged "no facts whatsoever" supporting any inference of scienter). Moreover, even if Defendants could offer some non-fraudulent purpose for some of those statements, Defendants cannot demonstrate that the fraudulent purpose – including Bricklin's effort to hide the fact that he and the other Defendants were looting VV – is any less compelling.

As a result, CADA has adequately alleged scienter.

III. CADA HAS ALLEGED CAUSATION.

A plaintiff must plead two types of causation to state a claim under Rule 10b-5: (1) transaction causation (also known as "reliance"), and (2) loss causation (also described as "proximate cause"). *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 341-42 (2005); *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 186 (2d Cir. 2001). To plead transaction causation, the plaintiff must allege "that *but for* the fraudulent statement or omission, the plaintiff would not have entered into the transaction." *Castellano*, 257 F.3d at 186 (quoting *Suez Equity Investors v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001)). To plead loss causation, the plaintiff must allege "that the subject of the fraudulent statement or omission was the cause of the actual loss suffered." *Castellano*, 257 F.3d at 186 (quoting *Suez*, 250 F.3d at 95). In other words, to plead loss causation, the plaintiff must allege that the damages it suffered were a "foreseeable consequence" of the misstatement or omission. *Castellano*, 257 F.3d at 186 (quoting *Suez*, 250 F.3d at 96). The Federal Rules "are not meant to impose a great burden upon a plaintiff" attempting to plead causation. *Dura*, 544 U.S. at 347. Rather, the plaintiff need only "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Id.*

Here, Defendants claim that the Complaint is "entirely silent" as to whether any of the alleged misstatements "could be construed as the but-for cause of CADA's investment or the ultimate cause of any actual loss." MTD at 15. CADA, however, has properly pleaded both transaction causation and loss causation.

First, CADA clearly alleges reliance by pleading that it only decided to invest an additional $2 million with VV as a result of Bricklin's representations, and that it relied on the truthfulness of those representations in reaching its decision to make the additional investment. Complaint ¶¶ 21, 30, 39-40. Defendants' contention that CADA does not explicitly state that these representations were the "*but for*" cause of its additional investment, and that CADA "may well have made the additional investment" even if it knew, for example, the truth about VV's financial situation and Defendants' looting of the company, MTD at 18-19, misconstrues Plaintiff's pleading burden, and is far-fetched, to say the least. Indeed, Defendants essentially argue that by failing to include the magic words "*but for*" in the Complaint, CADA has failed to allege reliance. There is no such requirement, of course, and CADA's allegations regarding its detrimental reliance on Bricklin's misstatements are sufficient to plead transaction causation. Complaint ¶¶ 30, 40.

Second, CADA also alleges loss causation by pleading that it made the decision to invest an additional $2 million based on Bricklin's representations, Complaint ¶¶ 21, 30, 39-40, and by pleading that its entire $4 million investment (i.e., including the additional $2 million invested as a result of the misrepresentations), is now worthless as a result of Defendants' conduct, *id.* ¶ 27. Indeed, it was the intended result of Bricklin's efforts to induce CADA to make the additional investment not for the benefit of CADA as an investor, but rather, in a further attempt to unjustly enrich Defendants. *Id.* ¶ 22. In other words, CADA alleges that the loss of its additional $2 million investment was clearly a foreseeable consequence of Defendants' looting of VV and Bricklin's false statements intended to cover up that fraud scheme.

Accordingly, CADA has adequately alleged causation.

CONCLUSION

For the foregoing reasons, CADA respectfully requests that the Court deny Defendants' motion to dismiss in its entirety, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 21, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2007, a copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

Charles T. Lee / [signature]

Charles T. Lee [CL 5934]